

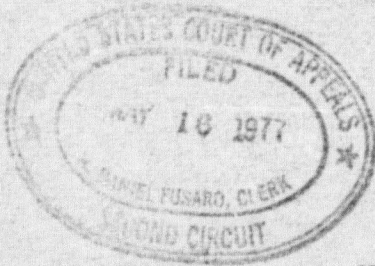
***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6032

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



GWENDOLYN D. KING and NELLIE AVERY,

Plaintiffs-Appellees,

v.

HOUSING AUTHORITY OF THE CITY OF HARTFORD,

Defendant-Appellant,

and

J. CHARLES MOKRISKI, individually and in his capacity as Chairman of the Board of Commissioners of the Housing Authority of the City of Hartford, LIONEL DE JESUS, individually and in his capacity as Vice-Chairman of the Board of Commissioners of the Housing Authority of the City of Hartford, REV. CYRIL C. BURKE, individually and in his capacity as Treasurer of the Board of Commissioners of the Housing Authority of the City of Hartford, ALBERT E. COTTER, individually and in his capacity as Assistant Treasurer of the Housing Authority of the City of Hartford, ARTHUR L. ALSTON, individually and in his capacity as Assistant Treasurer of the Housing Authority of the City of Hartford, DANIEL LYONS, individually and in his capacity as Executive Director of the Housing Authority of the City of Hartford,

Defendants,

and

PATRICIA ROBERTS HARRIS, individually and in her capacity as Secretary of the U.S. Department of Housing and Urban Development,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR DEFENDANT-APPELLEE
SECRETARY OF THE UNITED STATES DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT

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PATRICIA ROBERTS HARRIS, individually and in her capacity as Secretary of the U.S. Department of Housing and Urban Development,

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR DEFENDANT-APPELLEE
SECRETARY OF THE UNITED STATES DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court abused its discretion in granting plaintiffs' motion for a preliminary injunction.
2. Whether the Department of Housing and Urban Development (HUD) possessed the statutory authority to promulgate regulations requiring notice and the opportunity for a hearing prior to the eviction of tenants from HUD-financed local housing projects.

STATEMENT OF THE CASE

Appellant Housing Authority of the City of Hartford (HHA) appeals from a preliminary injunction order restraining it from evicting low-income tenants without complying with the notice and hearing provisions required by certain HUD regulations. (24 C.F.R. §866.1, et seq.) Plaintiff-appellees, low-income tenants residing in federally assisted public housing projects operated by defendant HHA, brought this class action in the District Court seeking to require the HHA to adopt regulations issued by HUD regarding lease provisions and grievance procedures. (24 C.F.R. §866.1) The complaint also named the Secretary of HUD as a defendant, alleging her failure to enforce these regulations as they applied to defendant HHA. (Joint Appendix (JA), p. 3) Plaintiffs also moved for a preliminary injunction to prohibit defendant HHA from evicting the named plaintiffs and other tenants for nonpayment of rent without conforming to the notice and hearing provisions mandated by HUD regulations.

Defendants HHA and named HHA officials filed their answer admitting the operative factual allegations of the complaint but

asserting that the subject HUD regulations contravened the United States Housing Act, as amended, 42 U.S.C. §1437, et seq., in that they failed to promote the legislative purpose of establishing "satisfactory procedures designed to assure the prompt payment and collection of rents and the prompt processing of evictions in the case of nonpayment of rent." (42 U.S.C. §1437d (c)(4)(B))

At the same time, the HHA cross-complained against the Secretary of HUD, seeking a judgment declaring 24 C.F.R. §866.1, et seq., which requires a fourteen day administrative notice of intention to terminate for nonpayment of rent, to be inapplicable to the HHA's operations. (JA, p. 38)

In her answer, filed subsequent to HHA's taking of this appeal, the Secretary of HUD asserted the validity of the regulations at issue, and cross-complained against defendant HHA, seeking a court order mandating compliance with the lease provisions and grievance procedures.

At the hearing on plaintiffs' motion for a preliminary injunction, defendant Secretary filed a Memorandum of Law supporting the validity of the HUD regulations at issue. The Memorandum acknowledged that HUD was nominally a defendant but noted that in reality HUD's interests lay closer to those of plaintiffs. The Secretary thus did not oppose issuance of a preliminary injunction. Defendant HHA opposed issuance of the injunction, primarily on the grounds that the subject HUD regulations were invalid. Following this evidentiary hearing and consideration of briefs, Chief Judge T. Emmet Clarie held that the subject regulations were well within

the bounds of HUD's rulemaking authority. The court thus granted the plaintiffs' motion for a preliminary injunction, prohibiting defendant HHA from proceeding with pending state court actions against the named plaintiffs and from instituting further eviction actions based on nonpayment of rent against other low-income tenants without complying with the regulations regarding notice and hearing. (JA, p. 47)

Defendant HHA has appealed to this Court from Judge Clarie's ruling and order. Although it did not seek a preliminary injunction in the District Court, HUD seeks affirmance of the District Court's order because HUD supports the finding that plaintiff-appellees demonstrated likelihood of success on the merits in that the HUD regulations are valid and binding upon the HHA. Moreover, because the HHA's defense in this litigation rests primarily on an assertion that the regulations are invalid, the cross-claim filed by the Secretary, as well as the administration of the low-rent public housing program, could be adversely affected by a reversal of the District Court's order. HUD thus files this brief as a defendant-appellee in support of the preliminary injunction order.

STATEMENT OF FACTS

The United States Housing Act of 1937, as amended (the USHA), 42 U.S.C. §1437, et seq., declares that it "is the policy of the United States to promote the general welfare of the Nation by employing its funds and credits . . . to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income."

Pursuant to the USHA, the Secretary of HUD is authorized to "make loans or commitments to make loans to public housing agencies to help finance or refinance the development, acquisition, or operation of low-income housing projects" by public housing agencies. (42 U.S.C. §1437b(a))

The defendant Housing Authority of the City of Hartford is a public housing agency within the meaning of the USHA. (See 42 U.S.C. §1437a(6)) Pursuant to 42 U.S.C. §1437c(a), the Secretary "may make annual contributions to public housing agencies to assist in achieving and maintaining the low-income character of their projects." Furthermore, she "shall embody the provisions for such annual contributions in a contract guaranteeing their payment." (Id.)

Consistent with the USHA's declared policy and with her authority under the Act, the Secretary has entered into an annual contributions contract (ACC) with the HHA to provide financial assistance for the development and operation of low-income housing projects for the benefit of low-income families. In return, the HHA has agreed to comply with the terms and conditions of the ACC and the USHA.

Title 42 U.S.C. §1437d sets forth the provisions and requirements for an ACC. Under 42 U.S.C. §1437d(c)(4), ACCs shall require public housing agencies to "comply with such procedures and requirements as the Secretary may prescribe to assure that sound management practices will be followed in the operation of the project, including requirements pertaining to . . . the establishment

of satisfactory procedures designed to assure the prompt payment and collection of rents and the prompt processing of evictions in the case of nonpayment of rent."

In addition to her rulemaking power under 42 U.S.C. §1437d, the Secretary's general rulemaking power (42 U.S.C. §3535(d)) authorizes her to issue regulations that supplement the provisions of the ACC as well as implement the broad, remedial purposes of the USHA.

Pursuant to 42 U.S.C. §1437d and her general rulemaking authority, the Secretary issued regulations effective on August 7, 1975, requiring the public housing authorities to implement in their leases with tenants certain lease provisions and grievance procedures. See 24 C.F.R. §866.1, et seq. The regulations cited set forth lease requirements, and state the obligations of both tenants and public housing authorities. Thus, under 24 C.F.R. §866.4(1) and (m), the regulations state:

(1) Termination of the lease: The lease shall set forth the procedures to be followed by the PHA and by the tenant in terminating the lease which shall provide:

- (1) That the PHA shall not terminate or refuse to renew the lease other than for serious or repeated violation of material terms of the lease such as failure to make payments due under the lease or to fulfill the tenant obligations set forth in §866.4(f) or for other good cause.
- (2) That the PHA shall give written notice of termination of the lease of:
 - (1) 14 days in the case of failure to pay rent;

(ii) a reasonable time commensurate with the exigencies of the situation in the case of creation or maintenance of a threat to the health or safety of other tenants or PHA employees; and

(iii) 30 days in all other cases.

- (3) That the notice of termination to the tenant shall state reasons for the termination, shall inform the tenant of his right to make such reply as he may wish and of his right to request a hearing in accordance with the PHA's grievance procedure.

(m) Grievance procedures: The lease shall provide that all disputes concerning the obligations of the tenant or the PHA shall be resolved in accordance with the PHA grievance procedures which shall comply with [applicable regulations].

These regulations were promulgated by the Secretary after careful consideration of the comments received from both tenant organizations and representatives of public housing agencies. Thus, "[i]n each of the many sections of the regulation where tenant advocates and Public Housing Agencies (PHAs) submitted comments reflecting diametrically opposed views, the Department has adopted a provision which, in its opinion, is equitable to both tenants and the PHAs." HUD Notice HM 75-36 (24 C.F.R. §866). The regulations superseded previous HUD Circulars (RHM 7465.8 and RHM 7465.9) that had also attempted to strike a balance between sometimes conflicting tenant and PHA concerns. Those circulars also attested to the fact that "many of the problems faced by management and tenants in low-rent public housing have resulted in friction and strain in tenant-management relations and in litigation, costly to both management and tenants; much of which

might have been avoided had some kind of procedure been available for grievances to be aired before an impartial individual or panel." (HUD Circular RHM 7465.9)

Despite the fact that these regulations were duly promulgated by the Secretary, the defendant HHA refuses to include in its leases the requirements set forth at 24 C.F.R. §866.1, et seq., regarding termination of leases for nonpayment of rent. Furthermore, the HHA refuses to apply the notice and hearing provisions of its grievance procedures to cases involving termination of the lease for nonpayment of rent. Both these actions violate the HHA's annual contributions contract, the United States Housing Act of 1937, as amended, and 24 C.F.R. §866.1, et seq.

STATUTES INVOLVED

Title 42 U.S.C. §3535(d) states:

The Secretary may . . . make such rules and regulations as may be necessary to carry out [her] functions, powers, and duties.

Title 42 U.S.C. §1437 provides in pertinent part:

It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs.

Title 42 U.S.C. §1437d(c)(4)(B) provides:

(4) [T]he public housing agency shall comply with such procedures and requirements as the

Secretary may prescribe to assure that sound management practices will be followed in the operation of the project, including requirements pertaining to

(B) the establishment of satisfactory procedures designed to assure the prompt payment and collection of rents and the prompt processing of evictions in the case of nonpayment of rent.

SUMMARY OF ARGUMENT

The District Court's grant of the plaintiffs' motion for a preliminary injunction was based on a careful consideration of the issues in this case. The court correctly focused on whether the regulations were within HUD's statutory authority. Defendant-appellant HHA's attempt to state the issue as whether its procedures afford adequate due process is misleading and incorrect. The question is not whether the HHA's procedures adequately afford due process, but whether HUD possesses the authority under the USHA to promulgate regulations requiring appellant HHA to give its low-income tenants notice and an opportunity for a hearing prior to eviction. As shown below, the USHA, and especially 42 U.S.C. §1437, plainly give HUD such authority.

Grant of a preliminary injunction lies within the District Court's broad discretion. The District Court considered both irreparable injury and likelihood of success on the merits, and then granted an injunction. This Court is thus limited to consideration of whether the lower court abused its discretion. Since appellant has made no such showing, the District Court's Order may not be set aside.

ARGUMENT

I. The District Court Considered All Relevant Factors And Did Not Abuse Its Discretion In Granting Plaintiffs' Motion For A Preliminary Injunction

"It is . . . familiar law that the granting of preliminary injunctive relief lies within the sound discretion of the District Court and will not be disturbed unless there is an abuse of that discretion. Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32, 95 S.Ct. 2561, 2567-2568, 45 L.Ed.2d 648, 659-660 (1975), or unless there is a clear mistake of law. 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1159 (2d Cir. 1974); Exxon Corp. v. City of New York, 480 F.2d 460, 464 (2d Cir. 1973)." Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356 (1976).

In determining whether the District Court abused its discretion in granting the preliminary injunction, the reviewing court considers whether plaintiffs below made the requisite showing of either "(1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Triebwasser & Katz, supra, at 1358.^{1/}

^{1/} Although the record supports a determination of both irreparable injury to plaintiffs and likelihood of success on the merits, this brief focuses on the latter finding since defendant-appellee's primary interest is in upholding the lower court's determination of the validity of HUD's regulations. Furthermore, since defendant-appellee HUD is not a party to the injunction and is (though perhaps nominally) a defendant, the issue of irreparable injury to plaintiffs is more appropriately addressed by plaintiff-appellees in their brief. (See brief for plaintiff-appellee, pp. 30 ff.)

A. The District Court Properly Determined
That Plaintiffs Had Shown Probability
Of Success On The Merits Since The Regu-
lations At Issue Are Clearly Within
HUD's Statutory Authority

In considering the probability of success on the merits,
the District Court properly focused the issue as follows:

THE COURT: Isn't it, isn't the real question here
whether or not the regulations are consistent with
legislative authority by Congress? And if it isn't,
then it is invalid. If it is consistent, then it
is valid, provided it doesn't violate any constitu-
tional provisions. [JA, p. 72]

Federal defendant submits that the lower court correctly
relied on well-established principles and authority to find that
the HUD regulations at issue were well within the Secretary's
statutory authority, and thus that plaintiffs had shown a high
probability of success on the merits. These same established
principles should be considered by this Court in reviewing the
District Court's order for abuse of discretion.

It is well settled that an administrative regulation is pre-
sumptively valid, and one who attacks it has the burden of showing
its invalidity by demonstrating it is unreasonable or plainly in-
consistent with the enabling statute. New York Foreign Freight
Forwarders & Brokers Association v. Federal Maritime Comm., 337
F.2d 289, 295 (2d Cir. 1964), cert. denied, 380 U.S. 914 (1965);
State of Florida v. Matthews, 526 F.2d 319 (5th Cir. 1976). See
also Udall v. Tallman, 380 U.S. 1 (1965); Housing Authority of
the City of Omaha, Nebraska v. United States Housing Authority,
468 F.2d 1 (8th Cir. 1972), cert. denied, 410 U.S. 927 (1972).
Where regulations are issued pursuant to general rulemaking

authority, which is one basis for the regulations in question here (see 42 U.S.C. §3535(d)), the Supreme Court has enunciated the following standard of review:

Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973), citing Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-281 (1969).

The regulations at issue in the instant case were promulgated pursuant to both the Secretary's general rulemaking power (42 U.S.C. §3535(d)), which authorizes her to implement the broad, remedial purposes of the USHA, as well as the specific rulemaking authority of 42 U.S.C. §1437d, which requires the housing agencies to comply with "such procedures as the Secretary may prescribe . . . pertaining to . . . the establishment of satisfactory procedures designed to assure the prompt payment and collection of rents and the prompt processing of evictions in the case of non-payment of rent." (Emphasis added) As such, they must be sustained if "reasonably related" to the purposes of the enabling legislation. Mourning v. Family Publications Services, Inc., *supra*; Thorpe v. Housing Authority of the City of Durham, *supra*.

Appellant argues that Congress was gravely concerned about the problems faced by housing agencies in their attempt to maximize rental income and reduce dependence on operating subsidies, and that the subject HUD regulations contravene this Congressional

mandate, as expressed in 42 U.S.C. §1437d. (See appellant's brief, pp. 12-13) Federal defendant-appellee does not deny that one of Congress' concerns was assuring sound financial management for housing agencies. That much is clear from the face of the statute. (See 42 U.S.C. §1437d). However, Congress' primary concern in enacting the USHA was to "remedy the acute shortage of decent, safe, and sanitary dwellings for families of low income." (42 U.S.C. §1437) Although sound management practices and prompt rent collection is undeniably necessary as one technique to further the more general goal, other, sometimes conflicting concerns must also be considered, and a balance struck. Thus, as stated earlier, before issuing the subject regulations, HUD carefully considered many views and interests presented by both tenant groups and housing agency representatives. (See, e.g., HUD Notice HM 75-36 (24 C.F.R. §866); HUD Circulars RHM 7465.8 and 7465.9.) The main concerns of each of these groups may often conflict, with tenants perhaps most interested in protecting their tenancy and housing agencies most concerned with financing and management. HUD's responsibility thus becomes to blend these two concerns into a viable mix of tenant-management responsibilities and protections. This was done in the circulars, as well as in the regulations at issue here. It cannot be said that the particular "mix" chosen by HUD bears no reasonable relationship to the purposes of the United States Housing Act.

The validity of the HUD Circulars upon which these regulations were based has been upheld by the Supreme Court, as well as

various Circuit Courts. Thus, in Thorpe v. Housing Authority of the City of Durham, supra, the Supreme Court held that the 1967 HUD Circular requiring public housing authorities to provide notice of termination of a tenancy and an opportunity to reply was a lawful exercise of HUD's rulemaking authority under the USHA:

One of the specific purposes of the federal housing acts is to provide "a decent home and a suitable living environment for every American family" [footnote omitted] that lacks the financial means of providing such a home without governmental aid. A procedure requiring housing authorities to explain why they are evicting a tenant who is apparently among those people in need of such assistance certainly furthers this goal. We therefore cannot hold that the circular's requirements bear no reasonable relationship to the purposes for which HUD's rulemaking power was authorized. 393 U.S. 268, 281.

In Housing Authority of the City of Omaha, supra, which considered the validity of 1971 Circulars mandating lease and grievance procedures, the Eighth Circuit, after citing the above-quoted Supreme Court holding in Thorpe, added this observation:

Here HUD seeks to institute new lease provisions which primarily recognize the rights of tenants while at the same time not ignoring the rights of landlords, and which institute new grievance procedures designed to reduce friction and courtroom litigation. These objectives, in turn, are alleged to promote the larger goals of better tenant-management relations and better public housing environments which doubtless conform with the objectives of the Housing Act. It is not unreasonable or arbitrary to expect that the new lease provisions and grievance procedures may bring about these desired goals. See Housing Authority of the City of Milwaukee v. Mosby, 192 N.W.2d 913 (Wis. 1972).

Ultimately, the real issue becomes whether HUD or the Housing Authority has the responsibility for balancing the sometimes conflicting interests of tenant and housing authority groups. Despite

the fact that Congress intended to vest maximum responsibility for administration in the local housing authority (42 U.S.C. §1437), HUD has overall responsibility for setting policy. This issue was considered in the City of Omaha case, supra. After noting that HUD's "construction of its own enabling legislation is to be given great weight when it enhances the general purposes and policies underlying the [United States Housing] Act," the Eighth Circuit held the 1971 HUD Circulars valid under 42 U.S.C. §1401 (currently 42 U.S.C. §1437):

Nevertheless, we think it clear that HUD does have the ultimate supervision and authority in carrying out the objectives of the Housing Act. We conclude this to be true by the express terms of the statute itself as well as by the legislative history set forth above.

In interpreting Section 1401, we find it significant that (1) there was not a complete transfer of authority to the local housing authorities, [footnote omitted] (2) although "administration" is not confined to budgetary acts and may necessarily be related to policy decisions, the ultimate responsibility for policy lies with [HUD] to achieve uniformity in fulfilling the objectives of the Act, and (3) where HUD determines that local authorities have failed to act or have acted in an inimical way to the objectives of the Act, that the ultimate authority is vested in HUD to set overall policy. When the latter occurs the real limitation is whether its policies are reasonably related to carrying out Congress' expressed objectives to the low-rent housing program. 468 F.2d 1, 7.

Furthermore, despite vesting "in the local public housing agencies the maximum amount of responsibility in the administration of their housing programs" (42 U.S.C. §1437), Congress nevertheless specifically retained for the Secretary the authority to establish procedures relating to prompt payment of rent and

processing of evictions in the case of nonpayment -- and mandated that the housing agencies "shall comply with such procedures as the Secretary may prescribe." (42 U.S.C. §1437d(c)(4)(B))

Appellant HHA argues that HUD's regulations, when applied to it, frustrate Congressional intent because the HHA's present procedures for evicting tenants are more expeditious than those mandated by the regulations. It also contends that HUD's regulations unreasonably delay its ability to collect rents in a timely fashion. As previously stated, other concerns, also aimed at implementing the broad Congressional purposes enunciated in the USHA, were considered by HUD in drafting the regulations. As the District Court observed, the HUD regulations provide more expeditious treatment for eviction in nonpayment cases than in cases of eviction for "good cause" other than nonpayment. Thus, in nonpayment of rent cases, only fourteen days notice is required, whereas other cases require thirty days notice. These differing standards were expressly promulgated to take into account the need for establishing procedures "to assure the prompt payment and collection of rents and the prompt processing of evictions in the case of nonpayment of rent." (42 U.S.C. §1437d) Thus, the preamble to the regulations states:

In response to the Congressional concern for prompt eviction procedures and a similar PHA [public housing authority] concern expressed in the comments, the regulation provides for a 14 day notice in the case of failure to pay rent. . . . The thirty-day notice has been retained in all other cases. 40 Fed. Reg. 33403 (1975).

The HUD regulations were issued after careful consideration of the Congressional mandates in both 42 U.S.C. §1437 and §1437d, and strike a reasonable balance between management and tenant interests. As such, they are clearly "reasonably related" to the purposes of the United States Housing Act, and thus within HUD's authority to issue. Mourning v. Family Publications Service, supra; Thorpe v. Housing Authority of the City of Durham, supra.

Appellant HHA confuses the issues when it focuses on whether its own procedures afford adequate due process. The due process or lack of due process afforded by appellant's procedures is irrelevant to the standard of review that must be used by this Court. If HUD had the authority to promulgate the regulations, and if the regulations as issued do not clearly contravene the legislative intent in the enabling legislation, then they must be upheld and the HHA ordered to comply with them.

The major purpose of the USHA is to improve the welfare of the Nation by assisting low-income families to find decent dwellings. HUD has been granted the authority to fulfill that purpose. Sound management practices are a tool that must be used to accomplish the stated purpose--they are not the overriding purpose of the USHA. HUD has been authorized and is best suited to strike a balance between tenant and management rights and obligations. The regulations properly strike such a balance, are clearly reasonably related to the purposes enunciated by the United States Housing Act, and must be sustained.

CONCLUSION

For the foregoing reasons, the District Court's order granting a preliminary injunction should be affirmed.

Respectfully submitted,

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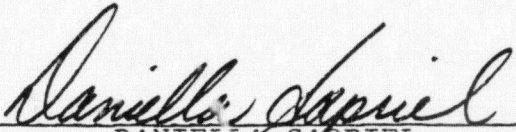
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